Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

(5)

No. 91-1603

In the Supreme Court of the United States

October 1991 Term

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,

Petitioners

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO OPPOSITIONS

to Petition for Writ of Certiorari

David O. Frederick,
Counsel of Record for Petitioners
The Law Office of David Frederick
2103 Rio Grande
Austin, Texas 78705
(512) 478 - 1968
(512) 479 - 8269 [facsimile]

Table of Authorities

cases

Icicle Seafood v. Worthington, 475 U.S. 709, 106 S.Ct. 1527 (1986) 5

Inwood Laboratories, Inc., v. Ives Laboratory, 456 U.S. 844, 102 S.Ct. 2182 (1982) 4

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781 (1982) 4

Sierra Club v. Kleppe, 427 U.S. 390, 96 S.Ct. 2718 (1976)2

Hawthorn Environmental Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D. Ga. 1976), aff'd *per curiam*, 551 F.2d 1055 (5th Cir.1977) 6

Mucha v. King, 792 F.2d 602, 606 (7th Cir. 1986) . . . 3

statutes and regulations

23 C.F.R. § 1508.23 (1991) 2

23 U.S.C. § 771.113 (1991) 6

40 C.F.R. §1508.22(a) (1991) 1

42 U.S.C. § 4332(C) (1991) 2

Rule 52(a), Fed. R. Civ. Proc. (1991) 1-3, 6-7

miscellaneous

52 *Fed. Reg.* 32090 (August 25, 1987) 2

Lee, *Principled Decision Making and the Proper Role of the Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. Cal. L. Rev. 235 (1991) 5

Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957) 3

Reply to Opposition Arguments

Respondents are counting on this Court's caseload being so heavy neither the Justices nor their briefing attorneys will have time to recognize the opportunity this petition offers the Court. Please show them to be wrong on this score.

Regarding the question of fact/question of law dichotomy:

It is, almost exclusively, Petitioners' first claim of "certworthiness" for this case that Respondents attack. Petitioners' first claim is that the case offers the Court an opportunity to elaborate on the theory behind the text of Rule 52(A) and, thereby, to realize more consistent appellate deference to trial court fact findings. To obscure the fact of this opportunity, Respondents by and large resort, first, to semantics (characterizing the court of appeals's findings as "legal conclusions" to which Rule 52(a) has no application) and, second, to exaggeration about exactly how uncontested the facts are, in the first place.

In evaluating Respondents' core arguments, consider the first as it applies to the question of whether the Austin Outer Loop is a "proposal" for action, be that action federal or otherwise. The district court found the Loop to be a proposal. On the facts, this finding certainly does not seem "clearly erroneous." For example, FHWA had published for the Loop a "Notice of Intent," which by regulatory definition[1] describes "proposed actions" and the text of which had six times characterized the Loop as a "proposed" project, etc.. 52 *Fed. Reg.* 32090 (August 25, 1987), Plaintiffs' trial

---

1 40 C.F.R. §1508.22(a) (1991).

exhibit no. 23.

Nonetheless, the court of appeals determined the Loop not to be a proposal. All Respondents claim the "proposal" question is one of law, not even one of mixed fact and law, and so assert the Rule 52(a) stricture does not apply.

However, the Council on Environmental Quality has by regulation[2] provided, "a proposal may exist in *fact* as well as by agency declaration that one exists." Furthermore, this Court's only opinion dealing with what is or is not a "proposal" for NEPA[3] purposes, *Sierra Club v. Kleppe*, 427 U.S. 390, 96 S.Ct. 2718 (1976), relied explicitly on the district court's *finding* there was no "proposal" integrating individual coal development projects. *Id.*, at 400-401 and 2726, respectively. Thus, the inferences one can fairly draw from the analyses to date regarding the "fact" or "legal conclusion" status the "proposal" question just do not support Respondents' bald semantic thrust.

In reality, of course, there is no bright line test for allocating each question of a case into either the "fact" or the "legal conclusion" category. Most often, one must focus on the theory underlying Rule 52(a) in order to correctly apply the rule. In Petitioners's view, Judge Posner's position, harsh though it can be in individual cases, is sound: appellate review should always defer to trial court determinations, except when doing otherwise will promote maintenance of uniform legal doctrine, because the maintenance of uniform

---

2 23 C.F.R. § 1508.23 (1991).

3 National Environmental Policy Act, 42 U.S.C. § 4332(C) (1991), principally.

legal doctrine (and not the meting out of "justice" in any particular case) is the preeminent appellate responsibility. *Mucha v. King*, 792 F.2d 602, 606 (7th Cir. 1986)[4].

By granting *certiorari* in this case, this Court gains the opportunity to walk through the rationale of Rule 52(a) and demonstrate its application to three determinations: is the Loop a proposal; if it is, is it a proposal for federal action; and, if (as the district court and Petitioners would have it) each of those determinations is made in the affirmative, is Segment 3 an integral part of the Loop?[5] The middle one of these three determinations also presents the opportunity to again explain the relationship between appellate emphasis on one element (not emphasized by the district court) of a legal definition and impermissible appellate "reweighting" of the evidence. See, *Inwood Laboratories, Inc., v. Ives Laboratory*, 456 U.S. 844, 102 S.Ct. 2182 (1982) (appellate error to reject, because of district court's low emphasis on

---

[4] Professor Charles Wright has addressed the "justice in any particular case" question by citation to Chief Justice Ellsworth's observation, "Surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over." Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 780-781 (1957).

[5] Respondent Corporation is the only Respondent that clearly states what the issue before the lower courts actually was. Br. in Opp. 4. The trial court did not hold for Petitioners because it found Segment 3 to itself be a proposal for major federal action; the trial court held for Petitioners because it found Segment 3 to be an integral part of the Austin Outer Loop, which itself was a proposal for major federal action. App. 47 and 50. (The district court's decision on MoPac South had two bases: MoPac South and Segment 3 were in fact one project, and MoPac South lacked substantial utility independent of federal projects to which it would connect. App. 67.)

evidence of mislabeling, the district court's finding regarding the extent of the defendant's knowledge).[6]

Regarding whether the facts were liquidated before trial:

Respondents' second general means of disparaging the "certworthiness" of this case is to contend all its principal facts were uncontested. They make this contention to support their related arguments that (1) credibility of witnesses is not an element of import in this case and (2) the appellate court was in as good a position as was the district court to draw inferences from "basic" facts.

All facts are not uncontested. Parties just do not spend four days in trial (three on the merits and one on the preliminary injunction), if all the facts are liquidated.

Petitioners rebutted, at pages 17 and 18 of their Petition, the argument the appellate court was in as good a position as was the district court to draw inferences from the allegedly liquidated basic facts. Furthermore, this Court has voiced twice in the past decade its directive that appellate courts should not draw factual inferences, but should remand to the district court for its more practiced execution of that task. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982), at 291 and 1791, respectively, and *Icicle Seafood v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527 (1986), at 714 and 1530, respectively. See, also, Lee, *Principled Decision Making and the Proper Role of the Federal Appellate Courts: The Mixed Questions Conflict*, 64

---

6 In the case at bar, the appellate court rejected the district court's finding the Loop is a proposal for "federal" action, because the appellate court felt the district court placed undue emphasis on prospective, rather than past or present, federal control.

S. Cal. L. Rev. 235 (1991), at 261-266.

As to the significance of the credibility of the witnesses, please consider, by way of example, the appellate court's finding "the outer loop does not exist except in speculative plans for years ahead."[7] App. 21. This finding is followed by the supporting evidence, "the federal authorities as well as the state authorities recognize this."

The federal witness that arguably "recognized" this was Peter Lombard, FHWA's regional planning director and only witness. He did not prove to be an analytical witness, and the district court judge was fairly blunt about the value of his testimony:

> WITNESS: May I elaborate on that? We'd look at . . .
>
> JUDGE: No, no, no, no, no. I've heard all of the elaboration I want, thank you.
>
> WITNESS: Okay, sorry.
>
> JUDGE: I think what we have here is the perfect example of a complete bureaucrat, and I am not getting anything of value from this, counsel, so you can wind it up whenever you're ready.

Trial tr. page 521.

---

[7] The district court did not even suggest such a finding, and Petitioners certainly contest it.

Two final points, briefly:

Finally, Respondents, to varying degrees and perhaps accidentally, encourage the misconceptions (1) the district court ordered someone to prepare an EIS and (2) no state-funded work may ever be enjoined under NEPA. The former just did not happen, and the latter ignores FHWA's interpretation[8] of its own regulation, 23 U.S.C. § 771.113 (1991), as well as case law (e.g., *Hawthorn Environmental Preservation Assoc. v. Coleman*, 417 F.Supp. 1091 (N.D. Ga. 1976), aff'd *per curiam*, 551 F.2d 1055 (5th Cir.1977)).

Prayer

Nothing Respondents argued effectively undercuts the value of this case as a vehicle by which this Court can force on the intermediate appellate courts more deference in fact for Rule 52(a). (Petitioners' first "question presented for review" sets up this opportunity.) Respondents barely addressed at all the substantive NEPA-law issues raised by this case. (These are set up by Petitioners' second and third "questions presented for review.")

Petitioners in their initial prayer requested issuance of the writ of *certiorari*, and that is still their prayer. Given the demands on this Court's resources, it remains Petitioners' grudging judgment[9] a summary disposition based on the Rule

---

8 Set forth at App. 71.

9 Being environmental advocates, Petitioners hate to forego the chance to get a definitive statement of the law regarding, especially, the relevance for NEPA application of thoroughly-proved prospective federal control.

52(a) issues would be the most appropriate course of action. On reflection, however, the extremely succinct language suggested in the Petition prayer now seems inadequate; Petitioners now endorse an opinion that explicitly elaborates on the "doctrinal uniformity" mission of appellate courts.